Religious Instruction in the Public School System
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CONCLUSION

Neither recoupment, estoppel nor Section 3801 is broad enough to effectuate a result which will prevent hardship in every case where claims are barred by the statute of limitations. Important considerations of administration and expeditious collection of taxes, as well as the element of fairness in requiring a party to prosecute his claim promptly, override the equity of an otherwise just claim. In accordance with Congress' evaluation of these competing interests, embodied in the statute of limitations, the Supreme Court has indicated that recoupment will be allowed where it would prevent a harsh result and at the same time promote the Congressional purpose. By denying the advantages of inconsistency to the government and taxpayer alike, it encourages voluntary payment and discourages litigation. When limited to a defense against a claim arising from the same taxable event it does not revive stale claims.

RELIGIOUS INSTRUCTION IN THE PUBLIC SCHOOL SYSTEM

An outstanding characteristic of American democracy is the unprecedented extent[1] to which religion has been made a personal matter, completely removed from governmental cognizance and control.[2] This concept of the separation of Church and State[3] embodies two correlative ideas,[4] both essential to true religious freedom: (1) the State cannot restrict the belief, expression, or propagation of any religion,[5] except when public safety and good order are thereby endangered;[6] (2) State support and encouragement of any religion is forbidden.[7] Though these ideas continue to be subjects of attack

1. BEARD AND BEARD, BASIC HISTORY OF THE UNITED STATES 14 (1944); *cf.* Niebuhr, *Sectarian Education*, in 5 ENCYC. SOC. SCI. 421, 422-23 (1931) (discussing degree to which England, Canada, Sweden and other countries support schools providing religious instruction in the established religion of the country).

2. "[T]here is not a shadow of right in the general government to intermeddle with religion." 5 WRITINGS OF JAMES MADISON 176 (Hunt ed. 1904); 2 STORY, COMMENTARIES ON THE CONSTITUTION 615 (5th ed., Bigelow, 1891); CURTI, THE GROWTH OF AMERICAN THOUGHT 135, 306 (1943).

3. 8 WORKS OF THOMAS JEFFERSON 113 (Ford's ed. 1904); COOLEY, CONSTITUTIONAL LIMITATIONS 659 (7th ed., Lane, 1903).

4. *See* Everson v. Board of Education, 330 U.S. 1, 40 (1947) (dissenting opinion); *cf.* Webster, *The Church and State in American Law*, 32 AM. L. REV. 529, 548 (1898).

5. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Martin v. Struthers, 319 U.S. 141 (1943); *Ex parte* Newman, 9 Cal. 502 (1858); *see* Commonwealth v. Kneeland, 20 Pick. 206, 225, 244 (Mass. 1938) (dissenting opinion).

6. Reynolds v. United States, 98 U.S. 145 (1878) (upholding Mormon's conviction of bigamy); State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926) (upholding law forbidding possession of peyote, though used in Indian religious ritual); State v. Neitzel, 69 Wash. 567, 125 Pac. 939 (1912) (upholding vagrancy conviction of a minister of the "National Astrological Society" charged with fortune-telling).

7. *See* Everson v. Board of Education, 330 U.S. 1, 15 (1947); Davis v. Beason, 133

by moralists and sectarian enthusiasts, and have at times been departed from on grounds of public welfare,[8] the doctrine itself is firmly established.[9]

Aware of the history of oppression which identification of temporal and spiritual power had produced, the founding fathers incorporated the concept of the separation of Church and State into the federal Constitution. In Article 6, Section 3 it was provided that membership in any church could not be a prerequisite for federal office.[10] A further guarantee of the severance of secular and religious authority was provided by specifically including in the First Amendment the dual prohibitions of religious interference and encouragement,[11] devices by which other governments had imposed religious conformity and had themselves been subjected to ecclesiastical domination.[12]

This prescription of a laissez faire religious policy for the federal government was of dual authorship; it was sponsored not only by free thinkers seeking the complete secularization of civil authority, but also by sectarians who wanted a free hand to establish a cherished faith in their own states.[13] Since the First Amendment bound the federal government only,[14] the states retained power to establish favored sects. Although minority religions were allowed to exist, state religions, to the support of which all were required to contribute, were set up in many states.[15] For many years, non-adherents to the tenets of organized Christianity found that the subordination of their rights of conscience to those of the majority was upheld by the state courts.[16]

U.S. 333, 342 (1890); People v. Salem, 20 Mich. 452, 483 (1870); Note, 1 BILL OF RIGHTS REV. 307, 309 (1941).

8. Minersville School District v. Gobitis, 310 U.S. 586 (1940) (upholding regulation requiring salute of flag in public school, despite religious objections), *overruled,* West Va. State Board of Education v. Barnette, 319 U.S. 624 (1943); Nichols v. Henry, 301 Ky. 655, 191 S.W.2d 930 (1946) (upholding legislation providing free transportation to parochial schools, despite incidental aid to religion, as serving public purpose). See also cases cited note 67 *infra.*

9. See COOLEY, CONSTITUTIONAL LIMITATIONS 663-64 (7th ed., Lane, 1903).

10. See 2 STORY, COMMENTARIES ON THE CONSTITUTION 634 (5th ed., Bigelow, 1891) ("[T]he Catholic and Protestant, the Calvinist and the Armenian, the Jew and the infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.").

11. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. AMEND. I.

12. CURTI, THE GROWTH OF AMERICAN THOUGHT, 135 *et seq.* (1943).

13. ZOLLMANN, AMERICAN CHURCH LAW 7 (1933); Hannan, *Religious Implications of the First and Fourteenth Amendments,* 5 JURIST 235, 236-37 (1945).

14. *See* Permoli v. New Orleans, 3 How. 589, 609 (U.S. 1845).

15. ZOLLMANN, AMERICAN CHURCH LAW 4 (1933) (Connecticut, Massachusetts and New Hampshire established the Congregational Church. Maryland and South Carolina established the Church of England). *See* Pfeiffer v. Board of Education, 118 Mich. 560, 585, 77 N.W. 250, 259 (1898).

"In selecting a religion, the people were not exposed to the hazard of choosing a false and defective religious system. Christianity had long been promulgated, its pretensions and excellencies well known, and its divine authority admitted. . . . And this religion, as understood by Protestants, tending, by its effects, to make every man submitting to its influence, a better husband, parent, child, neighbor, citizen, and magistrate, was by the people established as a fundamental and essential part of their constitution." Barnes v. Falmouth, 6 Tyng 401, 406 (Mass. 1810).

16. *E.g.,* Spiller v. Woburn, 12 Allen 127 (Mass. 1866) (expulsion of public school

However, the novel principle that religious freedom meant religious equality, rather than mere sufferance of dissidents, soon gave rise to state constitutional provisions embodying this concept.[17] In general they have been interpreted by state courts with a growing recognition that it is the latter's duty to keep Church and State mutually independent.[18]

However, this "hands off" religious policy proclaimed by the state and federal constitutions has not yet been completely effectuated. From the outset, some authoritative texts[19] and even opinions of the Supreme Court[20] have expressed the view that the federal Constitution does not bar preferential treatment of the Christian faith. Many state courts have similarly asserted that favoritism among the Christian denominations alone was forbidden, and that governmental support and encouragement of Christianity was commendable.[21] These anachronistic remnants of an ecclesiastico-civil nexus continue

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pupil for refusing to bow her head during prayer); People v. Ruggles, 8 Johns. 290 (N.Y. 1811) (blasphemy conviction on charge of denying divine origin of Christianity); Updegraph v. Commonwealth, 11 S. & R. 394 (Pa. 1824) (blasphemy conviction for maintaining in a debate that the scriptures "contained many lies").

17. *E.g.*, CONN. CONST. Art. I, §§ 3, 4 (1818) (eliminating established churches); MASS. CONST. AMEND. XX (1833) (similar to Connecticut provision); IOWA CONST. Art. I, § 3 (1857) (literal copy of First Amendment); N.J. CONST. Art. I, § 4 (1844) (a rewording of First Amendment's provisions); MAINE CONST. Art. I, § 3 (1819) (no subordination of any denomination). Also see COOLEY, CONSTITUTIONAL LIMITATIONS 660 (7th ed., Lane, 1903). But see N.H. CONST. Art. 6 (legislature still empowered to provide for public Protestant teachers).

18. *Ex parte* Newman, 9 Cal. 502 (1858) (Sunday "blue law" void as favoring Christianity); Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 Pac. 49 (1921) (school regulation requiring dancing instruction void as conflicting with some religious convictions); Shreveport v. Levy, 34 La. 468 (1874) ("blue law" invalid since it discriminated against those having no religious faith); Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y. Supp. 799 (Buffalo City Ct. 1926) (contractual provision requiring pupil at private school to attend Protestant services void as violation of constitutional rights); *see* Bloom v. Richards, 2 Ohio St. 387, 390 (1853) ("[I]t follows that neither Christianity, or [sic] any other system of religion, is a part of the law of this State."); *cf.* Commonwealth v. Kneeland, 20 Pick. 206, 244 (Mass. 1838) (dissenting opinion).

19. "[I]t is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects." 2 STORY, COMMENTARIES ON THE CONSTITUTION 628 (5th ed., Bigelow, 1891). "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation. . . ." *Id.* at 631. Also see 2 SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 489 (1921) ("[T]he guarantee of freedom of religious profession and worship secures to men . . . the positive, affirmative right to profess the Christian religion and to worship God in all usual Christian modes. . . . [I]t leaves the legislature free to raise and unfurl the banner of Christianity.").

20. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) ("[T]his is a Christian nation"); Vidal v. Girard's Executors, 2 How. 126, 198, 201 (U.S. 1844). *But see* Watson v. Jones, 13 Wall. 679, 728 (U.S. 1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect").

21. *See* First Methodist Episcopal Church v. Atlanta, 76 Ga. 181, 191, 193 (1886); Lindenmuller v. People, 33 Barb. 548, 562 (N.Y. 1861) ("Religious tolerance is entirely consistent with a recognized religion"); Updegraph v. Commonwealth, 11 S. & R. 394, 400 (Pa. 1824) ("Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania"); Church v. Bullock, 104 Tex. 1, 7, 109 S.W. 115, 118 (1908) (". . . Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits . . . offering

to excite the controversies which the constitutional policy was designed to end.

The field of education has been perhaps the most fruitful source of litigation involving the insulation of Church and State within their respective spheres.[22] State legislative attempts to abridge the right to private religious instruction by restricting the curriculum of sectarian schools,[23] and by compelling attendance at public schools,[24] were terminated by Supreme Court rulings.[25] Unfortunately, no such definite stand has yet been taken to enforce the coordinate guaranties against state support of religious instruction.[26] As a consequence of this judicial hesitancy, a steady stream of litigants have sought to compel or prevent state subsidization of sectarian teachings.[27]

These cases fall into two main categories: (1) suits concerning state support of private sectarian schools; (2) suits concerning religious instruction in public schools. Much has been written in defense or criticism of the many attempts made by organized church groups to obtain state aid for their denominational schools.[28] This note will discuss the second and equally important category—the cases involving the use of the public school system as a means for religious instruction.

The most common manifestation of religious influences in the public school has been the practice of regular reading of the King James Bible, sometimes accompanied by hymn singing and prayer recitations. Since there is no religious subject more controversial than the Bible,[29] this would appear to be a flagrant instance of state encouragement of Protestant Christianity.[30] Yet,

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prayers . . . in any public building of the government would produce a condition bordering upon moral anarchy").

22. See CONFREY, SECULARISM IN AMERICAN EDUCATION: ITS HISTORY 126-42 (1931); Niebuhr, *Sectarian Education*, in 5 ENCYC. SOC. SCI. 421, 423 (1931) ("[T]he elimination of all religious instruction from state schools—partly as a result of denominational conflict—outraged the convictions of those groups for whom the religious interest was the primary value in life.").

23. State v. Bartels, 191 Iowa 1060, 181 N.W. 508 (1921) (statute can prohibit teaching of German in private denominational school, though taught to enable children to understand religious instruction in German); Meyer v. State, 107 Neb. 657, 187 N.W. 100 (1922) (same).

24. Oregon Compulsory Education Act § 5259 (1922).

25. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923).

26. *See* Everson v. Board of Education, 330 U.S. 1, 27 (1947) (dissenting opinion).

27. For a compilation of many such cases see Note, 141 A.L.R. 1144 (1942).

28. Justifying such aid, see Note, 22 NOTRE DAME LAW. 192 (1947); Note, 18 NOTRE DAME LAW. 170 (1942); Decision, 7 FORD L. REV. 436 (1938). Criticizing such aid, see Note, 60 HARV. L. REV. 793 (1947); Note, 1 BILL OF RIGHTS REV. 307 (1941); Note, 50 YALE L. J. 917 (1941); Note, 25 ILL. L. REV. 547 (1930).

29. *See* People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 343 *et seq.*, 92 N.E. 251, 253 *et seq.* (1910).

30. Several state constitutions contain, in addition to usual guarantees of religious freedom, separate provisions explicitly forbidding any sectarian instruction in the public schools. *See, e.g.*, ARIZ. CONST. Art. XI, § 7; MONT. CONST. Art. XI, § 9; NEV. CONST. Art. XI, § 147; N.M. CONST. Art. 21, § 4; OKLA. CONST. Art. I, § 5; UTAH CONST. Art. III, § 4; WIS. CONST. Art. 10, § 3; WYO. CONST. Art. 7, § 12.

a great number of state courts[31] and legislatures[32] have condoned such practices, letting their own religious convictions,[33] or the pressure of organized church groups,[34] blind them to their duty of adhering to the constitutional safeguards of religious freedom.

Several of these decisions have made much of the fact that the state constitutional provisions involved prohibited "sectarian" influences, and have held that the Bible and general prayer used were non-sectarian.[35] Where Catholic, Jewish, and agnostic elements formed a substantial part of the population, further justification was proffered. Thus decisions have been based on findings that the Bible was in use merely as a textbook,[36] or for the inculcation of general moral principles.[37] An additional device for overcoming the constitutional ban has been the emphasis on the fact that such devotional exercises are voluntary, pupils being excused from participation at parental request.[38]

In some state tribunals, however, full effect has been given the constitutional mandates.[39] Some courts have held that Bible reading and prayer reci-

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31. For a revealing illustration of such judicial recalcitrance in the face of specific constitutional safeguards, *see* Moore v. Monroe, 64 Iowa 367, 369, 20 N.W. 475, 478 (1884).

32. *See, e.g.,* ALA. CODE tit. 52, § 542 (1940); IDAHO CODE § 32-2205, 2206 (1932); IND. ANN. STAT. § 28-5101 (Burns 1933); MASS. ANN. LAWS c. 71, § 31 (1945); PA. STAT. ANN., tit. 24, § 1555 (Purdon, 1930); TENN. STAT. § 2343(4) (Williams 1943). These statutes require public school teachers to read Bible selections to their classes daily.

33. *See* Wilkerson v. City of Rome, 152 Ga. 762, 773, 110 S.E. 895, 900 (1922); Hackett v. School District, 120 Ky. 608, 617, 87 S.W. 792, 794 (1905); Kaplan v. Independent School District, 171 Minn. 142, 145, 214 N.W. 18, 19 (1927); Church v. Bullock, 104 Tex. 1, 8, 109 S.W. 115, 118 (1908); *cf.* Lewis v. Board of Education, 157 Misc. 520, 524, 285 N.Y. Supp. 164, 167 (1935).

34. See CONFREY, SECULARISM IN AMERICAN EDUCATION: ITS HISTORY 134 *et seq.* (1931). Indicative of the attempts to inject religious, "moral" instruction into public schools, see COPE, TEN YEARS' PROGRESS IN RELIGIOUS EDUCATION 14, 20-23 (1913).

35. People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922); Hackett v. School District, 120 Ky. 608, 87 S.W. 792 (1905); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908); *cf.* Evans v. Selma Union H.S. Dist., 193 Cal. 54, 222 Pac. 801 (1924). Also see State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918) (refusing to enforce school board resolution favoring Bible study but distinguishing contrary decisions on the basis that the Washington constitution forbids "religious" rather than "sectarian" instruction).

36. Donahoe v. Richards, 38 Me. 379 (1854); Pfeiffer v. Board of Education, 118 Mich. 560, 77 N.W. 250 (1898).

37. *See* Kaplan v. Independent School District, 171 Minn. 142, 145, 214 N.W. 18 (1927); Hackett v. School District, 120 Ky. 608, 617, 87 S.W. 792, 794 (1905); *cf.* Vidal v. Girard's Executors, 2 How. 126, 200 (U.S. 1844); ZOLLMANN, AMERICAN CHURCH LAW 69 (1933).

38. *See* People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 294, 255 Pac. 610, 618 (1927); Moore v. Monroe, 64 Iowa 367, 370, 20 N.W. 475, 476 (1884); Kaplan v. Independent School District, 171 Minn. 142, 152, 214 N.W. 18, 22 (1927) (concurring opinion); *cf.* Spiller v. Woburn, 12 Allen 127, 129 (Mass. 1866).

39. The much publicized case of Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) is a striking instance of the alacrity with which the principle of separation of Church and State has been invoked where a doctrine not supported by organized church groups was involved. One of the grounds on which a Tennessee statute forbidding state school instruction in the theory of evolution was upheld, was that the legislature should exclude from the curriculum of tax supported institutions any subject "touching matters of religious faith," to make sure "that the State shall stand neutral . . . insuring the completeness of the separation of church and state." Scopes v. State, *supra,* at 127-28, 289 S.W. at 369 (concurring

tation in the public schools constitute an infringement of religious freedom and an unwarranted excursion by a state instrumentality into the field of sectarian instruction.[40] The practice of allowing all children whose parents objected to withdraw from such services has been characterized as arrant discrimination based upon religious differences.[41]

Other examples of denominational encroachments upon the secular nature of the public school system are not lacking. In instances where a parochial school has been inserted into the state public educational system with attempted disguise of its sectarian nature, courts have usually been alert to enjoin further state aid.[42] Too frequently, however, this device has escaped judicial detection.[43] Decisions are also in conflict as to whether a public school teacher can wear a distinctively religious dress[44] without running afoul of the prohibition against sectarian influences.[45]

In relatively recent years, the efforts of the various religious sects to use the public school system for the promulgation of their doctrines have taken a new form—obtaining the dismissal of school pupils at set times during school hours to permit them to attend classes in religious instruction. Proponents of this plan claim it to be free from constitutional objections, since such dismissal is only by parental request, participation is voluntary, and the instruction usually takes place away from the school premises.[46]

Since this practice accords with the desires of all the well established religious sects, few cases have arisen challenging its validity.[47] When first

opinion). In contrast to this strong declaration of policy, it should be noted that the compulsory Bible reading statute also remains a part of the Tennessee Education Law. TENN. STAT. § 2343(4) (Williams 1943).

40. People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890); *cf.* Board of Education v. Minor, 23 Ohio St. 211 (1872); State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918).

41. *See* People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 351, 92 N.E. 251, 256 (1910); Herold v. Parish Board of School Directors, 136 La. 1034, 1050, 68 So. 116, 121 (1915); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 199, 44 N.W. 967, 975 (1890); Kaplan v. Independent School District, 171 Minn. 142, 155, 214 N.W. 18, 23 (1927) (dissenting opinion).

42. Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941).

43. Hysong v. School District, 164 Pa. 629, 30 Atl. 482 (1894); New Haven v. Torrington, 132 Conn. 194, 43 A.2d 455 (1945); Millard v. Board of Education, 121 Ill. 297, 10 N.E. 669 (1887); State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940); *cf.* Richter v. Cordes, 100 Mich. 278, 58 N.W. 1110 (1894).

44. *Compare* Gerhard v. Heid, 66 N.D. 444, 267 N.W. 127 (1936) (permitting such garb), *with* O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906) (upholding regulation prohibiting such garb as in accord with the constitutional non-sectarian policy).

45. See note 30 *supra*.

46. See GORHAM, A STUDY OF THE STATUS OF WEEKDAY CHURCH SCHOOLS IN THE UNITED STATES 25-45 (1934) (stating that 40 states have such a program, a number thereof giving public school credit for such instruction). Also see Stephens, *The School, the Church, and the State,* 12 MARQ. L. REV. 206 (1928).

47. Despite the number of states condoning such a program, only five cases can be found in which its constitutionality has been called into question.

attempted, however, legal opposition was immediate. It was forcefully pointed out that as a consequence of the compulsory attendance laws such a program would result in school authorities enforcing attendance at sectarian instructions, contrary to constitutional guarantees[48] of religious freedom.[49] A 1925 New York decision spoke out even more strongly against such use of the public school instrumentality.[50] The constitutional provisions requiring separation of Church and State were recognized as forbidding the dissemination of sectarian tenets in public schools, and that "to permit the pupils to leave the school during school hours for religious instruction would accomplish the same purpose, and would in effect substitute religious instruction for the instruction required by law."[51]

Subsequent decisions have overridden these sound objections, employing the same tenuous reasoning used to justify Christian religious observances in the public schools themselves.[52] In *People ex rel. Lewis v. Graves*,[53] the New York Court of Appeals approved a plan whereby school children were excused for the last half hour of the session one day a week to attend church schools. The court stated that since no recitations were lost, no school credit awarded, and no public money expended, the slight amount of the teacher's time required did not render the practice open to state constitutional objections. The lower court decision, here affirmed, had argued that such a system merely gave effect to the parents' right to have their children receive religious instruction.[54]

A recent Illinois decision, now before the United States Supreme Court, *People ex rel. McCollum v. Board of Education*,[55] effectively demonstrates the extremes to which this reasoning may lead. An association of Catholic, Protestant, and Jewish clergymen obtained the school board's permission to hold separate religious classes within the public schools during school hours.

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48. PA. CONST. Art. I, § 3.

49. *See* Religious Instruction in Public Schools, 5 Pa. D. & C. 137, 138 (1911) (Report of Attorney General). It should be noted that Pennsylvania has a statute requiring daily reading of the Bible in all public schools. PA. STAT. ANN. tit. 24, § 1555 (Purdon 1930). In addition, § 1556 makes failure of a teacher to read ten Bible verses daily grounds for discharge, a provision perilously close to a religious test. Apparently the proposed plan was considered to be an even more obvious violation of the constitutional policy of separation of church and state than Bible reading.

50. Stein v. Brown, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. 1925).

51. *Id.* at 696, 211 N.Y. Supp. at 826.

52. See page 1350 *supra*.

53. 245 N.Y. 195, 156 N.E. 663 (1927).

54. People *ex rel.* Lewis v. Graves, 219 App. Div. 233, 219 N.Y. Supp. 189 (3d Dep't 1927), *aff'd*, 245 N.Y. 195, 156 N.E. 663 (1927). A New York statute now expressly allows early dismissal of public school students for religious instruction. NEW YORK EDUCATION LAW § 625B (McKinney 1945). Courts of other states have adopted the same reasoning in approving similar plans. People *ex rel.* Latimer v. Board of Education, 394 Ill. 228, 68 N.E.2d 305 (1946); Gordon v. Board of Education, 178 P.2d 488 (Cal. App. 1947).

55. 396 Ill. 14, 71 N.E.2d 161 (1947), *probable jurisdiction noted*, 67 Sup. Ct. 1524 (1947).

Admission to these classes was by parental request and all books were furnished by the association. The Illinois court held that such a system did not violate the state or federal Constitution.

It is clear that these cases, upholding dismissal for religious instruction within or without the school, are the result of an inadequate analysis of the American principle of the separation of Church and State. The courts accord formal recognition to the fact that abridgment of religion is forbidden,[56] but fail to recognize that these practices may in fact result in such abridgment.[57] Further, they ignore the second aspect of this dual principle—the prohibition of any type of state support of any and all branches of religious faith.[58] It is evident that these practices constitute state aid of a substantial nature. Religious denominations are enabled to divert to sectarian instruction the pupils assembled for secular education by state compulsory school attendance laws. Yet this support has been countenanced under the pretext that it is required by the guarantee against state interference with religion.[59] Such confusion of these two complementary provisions may well succeed in destroying the principle they were designed to effectuate.

A definite stand by the United States Supreme Court in those cases of this nature which are presented for its review may now be anticipated. In the first place, the presumption of constitutionality which the Court accords to most state action does not apply with equal rigor to action affecting civil rights.[60] Secondly, action by a school board is state action within the meaning of the Fourteenth Amendment[61] and subject to the same constitutional inquiry as state legislation.[62] Further, as the result of a steady development it is now well established that the Fourteenth Amendment makes binding upon the states all the guarantees of freedom which the First Amendment imposed upon the national government.[63]

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56. *See* People *ex rel.* McCollum v. Board of Education, 396 Ill. 14, 29, 71 N.E.2d 161, 168 (1947); Gordon v. Board of Education, 178 P.2d 488, 493 (Cal. App. 1947).

57. See page 1355 *infra.*

58. "United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both." Board of Education v. Minor, 23 Ohio St. 211, 248 (1872).

59. *See* People *ex rel.* Latimer v. Board of Education, 394 Ill. 228, 233, 68 N.E.2d 305, 309 (1946); People *ex rel.* Lewis v. Graves, 245 N.Y. 195, 198, 156 N.E. 663, 664 (1927).

60. *See* West Va. State Board of Education v. Barnette, 319 U.S. 624, 639 (1943); Schneider v. Irvington, 308 U.S. 147, 161 (1939); United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

61. *See* West Va. State Board of Education v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the states, protects the citizens against the State itself and all of its creatures—Boards of Education not excepted.").

62. *See* Snowden v. Hughes, 321 U.S. 1, 11 (1944) ("If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature.").

63. Illustrating this development *see* Hamilton v. Regents, 293 U.S. 245, 265 (1934) (Cardozo, J., concurring: "I assume for the present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Four-

Complete recognition of the dual nature of the First Amendment's guarantee of religious freedom, and a determination to give it full effect is demonstrated by the reasoning of the Supreme Court in the controversial "parochial school bus case," *Everson v. Board of Education.*[64] "The people . . . reached the conclusion that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any individual or groups. . . . The broad meaning given to the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom. . . . There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause. . . . The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[65] A similar sentiment was expressed in the dissent.[66] In the *Everson* case a statute providing for state supported transportation for parochial school children was upheld as a measure serving a public purpose, although it indirectly aided sectarian schools.[67] While this ruling is perhaps not fully in accord with the basic propositions enunciated in the decision, it seems obvious that statutes or regulations allowing or requiring Bible services, or permitting segregated religious instruction as a part of the public school system, cannot be similarly justified as an exercise of the police power. Though supporters of these practices may maintain that public welfare demands the moral training obtained from religious teaching, it is sufficient answer that the Constitution forbids the State to achieve this purpose through the use of religion. The legitimate exercise of governmental authority can not be frustrated because some benefit to religion results

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teenth Amendment against invasion by the states."); Palko v. Connecticut, 302 U.S. 319, 324 (1937) ("[T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes . . . the free exercise of religion. . . . In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."); Douglas v. Jeannette, 319 U.S. 157, 162 (1943) ("[T]he Fourteenth Amendment has made applicable to the states the guaranties of the First."). Also see Adamson v. People of California, 67 Sup. Ct. 1672, 1686 (1947) (Black, J., dissenting: "[O]ne of the chief objects that the provisions of the [Fourteenth] Amendment's first section separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states."). But see Mr. Justice Frankfurter, dissenting in West Va. State Board of Education v. Barnette, 319 U.S. 624, 649 (1943).

64. 330 U.S. 1 (1947).

65. *Id.* at 11, 15.

66. *Id.* at 31.

67. Also justifying incidental aid of religion on the ground that a primary public purpose was served, *see* Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930); Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1938); Chance v. Mississippi State Textbook R. & P. Board, 190 Miss. 453, 200 So. 706 (1941).

therefrom. Direct aid of religion, however, as a means for attaining any governmental objective encounters express Constitutional prohibition.

It may well be argued that allowing public school sessions to be interrupted for religious instruction is not only invalid as state support, but is also, as is the inclusion of Bible reading in the curriculum,[68] a violation of the more frequently invoked constitutional provisions forbidding abridgment of religious freedom. The firmly entrenched denominations with ample facilities are necessarily favored by such action.[69] In addition, those pupils who are not adherents of a majority faith either suffer the embarrassment of exclusion from participation in the program,[70] or are "impelled by the gregarious instincts of childhood to go with the crowd."[71] Though the plan may be voluntary and open to all religions, its practical effect may well be to discriminate against minority denominations and non-believers.[72]

One great virtue of the American public school is the association therein of pupils of varying religious, racial, and economic backgrounds. This commingling of diverse elements is an inestimable aid to national homogeneity and the elimination of social stratification.[73] A partial sacrifice of this democratic catalyst has necessarily been made by giving effect to the individual's right to choose a sectarian school, in obedience to the constitutional interdiction of governmental interference with religious belief and profession.[74] However, the "establishment of religion" clause of this same mandate,[75] properly construed, declares that the creation within the state educational instrumentality of the distinctions and frictions attendant upon segregation into religious sects is not only not demanded, but is expressly enjoined.[76]

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68. See page 1349 *supra.*

69. *See* Stein v. Brown, 125 Misc. 692, 696, 697, 211 N.Y. Supp. 822, 827 (Sup. Ct. 1925); *cf.* Antieu, *State Regulatory Laws and Religious Freedom,* 6 U. OF DET. L. J. 131, 135 (1943).

70. *See* Herold v. Parish Board of School Directors, 136 La. 1034, 1050, 68 So. 116, 121 (1915); Pfeiffer v. Board of Education, 118 Mich. 560, 586, 77 N.W. 250, 260 (1898) (dissenting opinion); Kaplan v. Independent School District, 171 Minn. 142, 155-56, 214 N.W. 18, 23 (1927) (dissenting opinion); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 199, 44 N.W. 967, 975 (1890).

71. *See* Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 205 (1918).

72. *See* People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 349, 92 N.E. 251, 256 (1910); Commonwealth v. Kneeland, 37 Mass. 206, 233 (1838) (dissenting opinion); *cf.* Shreveport v. Levy, 34 La. 468 (1874) (invalidating city ordinance compelling Sunday observance, except for those observing Saturday. Ordinance "might do very well" as a police regulation if it applied also to those observing Saturday, but by excepting them it discriminates against those wishing to observe neither.).

73. *See* State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 872, 91 N.W. 846, 847 (1902); Note, 50 YALE L.J. 917, 926-27 (1941); Note, 25 ILL. L. REV. 547, 548 (1930).

74. Cases cited note 25 *supra.*

75. U.S. CONST. AMEND. I.

76. "[A]s the state cannot forbid, neither can it perform or aid in performing the religious function." Everson v. Board of Education, 330 U.S. 1, 52 (1947) (dissenting opinion).